
Without the rule of law, there are no guarantees the economy will be free of state interference under the 2008 Constitution

The economic aspects of Burma’s 2008 Constitution have been notably absent from the recent written analysis of its implications for Burmese society. Though constitutions are not primarily economic documents, Burma’s latest Constitution does contain clauses that have economic import, and it is worth looking at them carefully.

There is an important caveat, however, and this is that a regime that consistently honors the rule of law only in the breach and has many incentives (financial and otherwise) for maintaining the status quo is unlikely to change its behavior anytime soon; therefore, the Constitution may amount to little. Regardless of whether the military abides by its Constitution, however, the document can provide insight into the thinking of its drafters.

The most significant economic aspects of Burma’s Constitution are contained in Chapter 1, which details the “Basic Principles of the Union.” Articles 35 and 36 (included here verbatim) declare Burma to be a market economy:

(35) The economic system of the Union is market economy system

(36) The Union shall:

(a) permit all economic forces such as the State, regional organizations, cooperatives, joint-ventures, private individual, so forth, to take part in economic activities for the development of the National economy;
(b) protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities;
(c) strive to improve the living standard of the people and development of investments;
(d) not nationalize economic enterprises;
(e) not demonetize the currency legally in circulation.

In great contrast to Burma’s avowedly socialist 1974 Constitution, the 2008 Constitution implies that Burma’s economic system will be market-based. Lip service is paid to cooperatives and the like, but the capitalist heart is otherwise, in principle, unequivocal. The references to monopolies and manipulation in Clause (b) are echoes of the colonial anxieties in modern Burma’s founding 1947 Constitution, and the clause should not necessarily cause problems.

Of great interest are clauses (d) and (e). Such negative pledges (declaring that the state will not do something) are not unusual in constitutional documents—the injunction in the US Constitution against the establishment of a state-supported religion is just one of the most famous—but these clauses evoke Burma’s tortured economic and monetary history.

In the past, to the great detriment of economic development and progress in Burma, the state nationalized enterprises, giving mostly inadequate or no compensation, and currency demonetization episodes became an infamous characteristic of the country. Whether these assurances in Burma’s latest Constitution can be trusted is open to doubt.

As already noted, the rule of law does not prevail in Burma, a country in which the right to private property is not respected. From the State Peace and Development Council (SPDC) leadership to petty officialdom, Burma's military regime is hardly constrained by formal legalities, and there is little to suppose (given the obvious incentives otherwise) that this will change in the absence of any profound political reform.

In short, secure property rights, which in their de facto existence are the motor for economic growth in countries such as China and the Asian "tigers," will not be established in Burma simply by constitutional assertion.

The expression "currency legally in circulation" in Clause (e) also gives pause. Does this allow room for interpretation? The 1964, 1985 and 1987 demonetization episodes were all founded upon legislation that withdrew legal tender status from certain specified currency denominations, after which such denominations in circulation were no longer legal tender. Some doubts must remain, therefore.

On balance, the provision of legal flexibility to allow for demonetization is probably not the intention of this clause. Burma's military regimes have not shown themselves to be especially adept at learning economic lessons, but their experiences of demonetization must surely be remembered.

What other purpose of the "legally in circulation" proviso can remain, then? It could be targeted at counterfeiting, or at the foreign currencies that circulate in Burma (against which other laws apply), or perhaps it refers to quasi-monetary instruments such as foreign exchange certificates. In the end, we are left wondering why there was no simple declaration that the national currency, in whatever denominations, cannot be demonetized.

Other sections of the new Constitution also cast doubt on the true extent to which a market economy will prevail in Burma, especially regarding the presumptions of the state and its organs. Of particular significance in this regard is Article 37:

(37) The Union:

(a) is the ultimate owner of all lands, and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union;
(b) shall enact necessary law to supervise extraction and utilization of State owned natural resources by economic forces;
(c) shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.

Clause (b) is not contradictory to a market economy (indeed, similar pre-eminent extraction rights of the state exist in most countries); and Clause (c) would be fundamental if it was truly applied in practice. Even here, however, the language betrays the constitutional drafters' perceptions that the right to private property is not a natural right, but one bestowed by the state.

It is Clause (a) of Article 37, however, that is the most problematic and significant barrier to investment by the private sector in Burma, especially in agriculture, which still produces more than half the country's Gross Domestic Product and employs more than two-thirds of the population.

Article 37 is little more than the continuation of the existing land title arrangements in Burma, which are more or less derived from the 1948 "Land Nationalisation Act." Under this provision, individuals are eligible for 30-year inheritable use rights on rural land, with such rights being determined by village and regional-level land committees, which determine annually whether the land has been used productively (this provided a potential threat that was greatly feared by many farmers whose land was devastated by Cyclone Nargis).

Land cannot be transferred legally between unrelated individuals, nor can it be used as collateral on loans, and Burmese landowners are denied the incentive and security to invest or otherwise improve their farms. Of course, the practice of the SPDC (as well as elements of the armed forces independently in the field) to engage in arbitrary land confiscation makes a mockery of land rights that do exist on paper.

The importance of the above can scarcely be overstated. According to the UN's Food and Agriculture Organization (among others), the ability to buy and sell title over land is a seminal economic right, the provision of which for Burmese agriculture is the "key to sector development.”

Seemingly less serious, but potentially harmful to the development of a market economy in Burma, are articles 29, 30 and 23(b):

23 (b). The Union shall…assist peasants to obtain equitable value of their agricultural produce.

29. The Union shall provide inputs, such as technology, investments, machinery, raw materials, so forth, to the extent possible for changeover from manual to mechanized agriculture.

30. The Union shall provide inputs, such as technology, investments, machinery, raw materials, so forth, to the extent possible, for development of industries.

Articles 29 and 30 suggest state involvement and limit a genuine market economic system to what the state actually provides. Article 23, Clause (b) looks innocuous on the surface, but it could allow state procurement of agricultural production of the kind that has been so destructive of Burma’s agricultural sector in the recent past. It depends on how it will work in practice.

Other components of Burma’s 2008 Constitution also determine the potential shape of its economy. This is the case with respect to the division of legislative and other powers between the central government (“The Union”), state and divisional authorities and the so-called “leading bodies” of self-administered divisions and areas, which incorporate many ethnic minorities, including both cease-fire and non-cease-fire groups.

The taxing and spending powers granted are particularly relevant. Most fiscal powers are concentrated with the central government, though Schedule Two defining the responsibilities of Region or State *Hluttaws* granted under Article 188 does allow state and regional authorities limited discretion over spending and revenues (the latter including excise duties and various municipal taxes). “Leading bodies” of self-administered divisions and areas have no say in spending and taxing, however. This is likely to affect the Constitution’s acceptability to hitherto financially autonomous ethnic groups.

The British economist John Maynard Keynes once observed that “madmen in authority” were usually (if unconsciously) the “slaves of some defunct economist.” Certainly Burma has had its madmen but, in contradiction of Keynes, economics has seldom played much of a role.

The hope that something different might arrive via Burma’s new Constitution is slender. Though Burma’s 1947 Constitution also had some troubling aspects, what separated it from those that followed was an overarching assumption that there was the rule of law.

To be sure, the latter did not prevail universally during the years of parliamentary democracy in Burma (1948-1962), but it was sufficiently respected for state action to be considered as confined within the boundaries of the law, rather than the obvious fiction this later became.

Moreover, the 1947 founding Constitution was supported during its life by other institutions that restrained the worst instincts and excesses of demagogic politicians. It is Burma’s misfortune that such institutions have been made servants of the junta. Their re-creation will require greater change to Burma’s political economy than the writing of a new Constitution by people with a vested interest to disregard it. The struggle goes on.

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